Internal Revenue Service

memorandum

CC:TL-N 5445-91
Br3:WEArmstrong

date: JUN 21 1991

to: District Counsel, Philadelphia CC:PHI

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: Joint return filings by nonfilers after statutory notice default

This memorandum is in response to your request of March 27, 1991, for tax litigation advice as to the impact of Phillips v. Commissioner, 86 T.C. 433, aff'd in part, rev'd in part, 851 F.2d 1492 (D.C. Cir. 1988) and Millsap v. Commissioner, 91 T.C. 926 (1988), on joint return filings under the circumstances described below.

ISSUES

(1) Whether the Service should process joint returns reflecting a refund due, filed by nonfilers after each spouse has defaulted on separate notices of deficiency, as it would any other claim for refund.

(2) Whether the Service should abate the assessment of a tax deficiency where a joint return reflecting a lesser tax liability is filed by nonfilers after a deficiency has been assessed but not paid.

CONCLUSION

(1) Where married taxpayers have filed no prior return and, where the married taxpayers have not filed a Tax Court petition and the deficiency has been assessed and paid for the tax year involved, we believe the filing of a joint return reflecting a refund due, subsequent thereto, constitutes a claim for refund. We also believe the Service should process such joint return as it would any other claim for return.

(2) Where married taxpayers have filed no prior return and, where the married taxpayers have not filed a Tax Court petition and the deficiency has been assessed but not paid for the tax year involved, the filing of a joint return subsequent thereto would have, under certain circumstances, the effect of a request for the abatement of tax. Because the mission of the Service includes collecting the proper amount of tax revenue and because I.R.C. § 6404(a) authorizes the Secretary to abate

the unpaid portion of the assessment of any tax which is excessive in amount, we believe the Service should abate any excessive assessment resulting from the filing of the valid joint return by the nonfilers.

FACTS

In your memorandum dated March 27, 1991, you raised the question of whether our acceptance of the result in Phillips v. Commissioner, 86 T.C. 433, aff'd in part, rev'd in part, 851 F.2d 1492 (D.C. Cir. 1988) and Millsap v.Commissioner, 91 T.C. 926 (1988), is limited to those situations which are pre-assessment and/or in which the years at issue are under the Tax Court's jurisdiction. You requested our advice as to whether the Service will allow the filing of a joint return by married nonfilers after each spouse has defaulted on separate notices of deficiency and the tax has been assessed. Specifically, you requested our views as to whether the Service should process joint returns reflecting a refund due, filed by nonfilers after each spouse has defaulted on separate notices of deficiency, as it would any other claim for refund.

In your memorandum, you also requested our views on how the Service should deal with joint returns filed after the assessment has been made but before the deficiency has been paid. You would suggest that they be treated as requests for abatement and either ignored or denied. You note that the administrative burden of first auditing a return many years after the due date, when the filing due date and administrative and statutory appeal procedures have been ignored, suggests that these taxpayers do not deserve the benefit of joint rates with respect to their tardy election.

DISCUSSION

Law

Section 6013(a) provides generally that a husband and wife may make a single return jointly of income taxes. However, where a prior separate return has been filed, the election of joint filing status is subject to the requirements of I.R.C. § 6013(b).

Section § 6013(b) precludes a married individual who has filed a prior separate return for a taxable year from making a joint return for that year after the due date of the return, if the conditions set forth in I.R.C. § 6013(b)(2) are not met. Prior to the holdings of Phillips and Millsap, it had been the position of the Service and was so held in Durovic v. Commissioner, 54 T.C. 1364 (1970), aff'd on this issue, 487

F.2d 36 (7th Cir. 1973), that taxpayers, who fail to file any return until after the limitation periods set forth in I.R.C. § 6013(b)(2), are precluded by I.R.C. § 6013(b) from obtaining joint return benefits.

In Phillips, the Tax Court overruled Durovic and held that a married taxpayer who has not filed income tax returns prior to the issuance of the statutory notice of deficiency for the tax years in which joint returns could have been made is not precluded from obtaining the benefits of joint rates, where no prior return has been filed for either the taxpayer or his spouse for the tax years involved. In so holding, the Tax Court and the District of Columbia Circuit reasoned that the legislative history and the clear statutory language of I.R.C. § 6013 suggest that the right to make a joint return is not affected by the limitations under I.R.C. § 6013(b) where no return has been previously filed for married taxpayers.

In Millsap, the scope of Phillips was expanded. There the Tax Court concluded that I.R.C. § 6020(b) returns prepared by the Commissioner on taxpayer's behalf do not constitute "separate" returns for purposes of I.R.C. § 6013(b). In so concluding, the Tax Court held that I.R.C. § 6020(b) returns prepared by the Commissioner do not preclude a taxpayer from obtaining the benefits of joint rates under I.R.C. § 6013(a).

It is the current position of Chief Counsel that married taxpayers who file an original joint return prior to the submission of a case for decision are entitled under I.R.C. § 6013(a) to the benefits of joint rates if no separate return has been filed by the taxpayers prior to the joint return filing. Further, neither the preparation of a return by the Commissioner on behalf of a taxpayer (under I.R.C. § 6020(b)), nor the issuance of a notice of deficiency shall serve as a prior return of the taxpayer so as to invoke the limitations for making of joint election under I.R.C. § 6013(b). See Chief Counsel Notice N(35)8(11)-1 (Mar. 20, 1989). This position has been coordinated with and agreed to by the Assistant Commissioner (Collection) and the Assistant Commissioner (Examination).

With respect to claims for credit or refund, Treas. Reg. § 301.6402-3 provides, in general, that in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return. Treas. Reg. § 301.6402-3(a)(5), provides that an individual's income tax return shall operate as a claim for refund or credit of the amount of overpayment disclosed by the return.

With respect to abatements, I.R.C. § 6404(b) provides that taxpayers are not permitted to file abatement claims in the case of assessed income taxes. However, the Secretary may abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability, if the assessment is made subsequent to the expiration of the period of limitations applicable thereto, or if the assessment has been erroneously or illegally made. I.R.C. § 6404(a), Treas. Reg. § 301.6404-1(a).

Joint return election and claim for refund or credit

In part, based on Phillips and Millsap, it is our position that if no prior return has been filed by married taxpayers for a tax year for which a joint return could have been made, I.R.C. § 6013(b) does not apply to preclude the taxpayers from obtaining the benefits of a joint return. Rather, in such circumstances, I.R.C. § 6013(a) is applicable. Thus, it is our position that where married taxpayers have filed no prior return and, where the married taxpayers have not filed a Tax Court petition and the deficiency has been assessed for the tax year involved, married taxpayers are not precluded by I.R.C. § 6013(b) from making a single return jointly of income taxes for such tax year.

If a petition has not been filed in the Tax Court and the deficiency has been assessed and paid, we believe the filing of a joint return reflecting an overpayment, under the circumstance described above, constitutes a claim for refund. Thus, we believe the Service should process the joint return as it would any other claim for refund. However, the limitations under I.R.C. § 6511 would apply and the amount which may be refunded would be limited pursuant to that statutory provision. Indeed, had a taxpayer sought an overpayment based on the use of joint rates in the Tax Court, it would have been granted by the court subject to I.R.C. § 6512.

If the taxpayers filed a refund suit because of the failure of the Service to act on the claim for refund noted above or because the Service denied the claim for refund, we believe that a court would allow taxpayers the benefits of a joint return as well as any other allowable claimed deductions which could be substantiated, based on the holdings of Phillips and Millsap. Cf. Tucker v. United States, 8 Cl. Ct 575 (1985) (where neither taxpayer nor his wife, nor the IRS on their behalf had filed tax returns for the years involved, taxpayer was not barred under I.R.C. § 6013(b)(2)(D) from having his income tax computed on the basis of joint filing rates even though taxpayer had filed a refund suit). However, the taxpayers would be entitled to a refund only to the extent provided by I.R.C. § 6511.

Joint return election and claim for abatement

Where married taxpayers have filed no prior return and, where the married taxpayers have not filed a Tax Court petition and the deficiency has been assessed but not paid for the tax year involved, the filing of a joint return subsequent thereto would have, under certain circumstances, the effect of a request for the abatement of tax. Nonetheless, for the reasons noted above the Service should process the joint return. Because the mission of the Service includes collecting the proper amount of tax revenue, see e.g., 1990-2 C.B. ii, and I.R.C. § 6404(a) authorizes the Secretary to abate the unpaid portion of the assessment of any tax which is excessive in amount or illegally or erroneously assessed, we believe that the Service should abate any excessive assessment resulting from the filing of valid joint returns by nonfilers under the circumstances described above.

Conclusion

In short, we believe that Counsel's current position and the holdings in Phillips and Millsap, require the Service to accept joint returns filed under the circumstances described above. Therefore, we do not believe that the holdings of Phillips and Millsap are limited to pre-assessment situations or to situations in which the tax years in issue are under Tax Court jurisdiction. Although we realize that it becomes progressively more difficult to process returns filed many years after their due dates, we believe the current position of Counsel, the holdings of Phillips and Millsap, and the risks of attorneys' fees being imposed on the Commissioner compel the Service to process joint returns filed under the circumstances described above regardless of the extent of the delinquency. It should be noted, however, that we do not believe the Service should process, where the nonfilers are in litigation, joint returns of nonfilers filed after the case has been submitted for decision. Phillips, 86 T.C. at 441 n.7. It also should be noted that in many situations the processing of delinquent joint returns filed by nonfilers under the circumstances noted enhances the collection of tax liability because it allows the Service to attempt to collect from both spouses rather than one.

If we can be of further assistance in this matter, please let us know.

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